Supreme Court, U.S.
FILED

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

JOHN F. GUIDO, BRAD HARRON, JOSEPH R. ADAMSKI, KENNETH W. HEISINGER, THOMAS C. LUEKEY, JEFFERY NICHOLLS, ERIC J. ORACH, and KEITH FRANKENFIELD,

and

CITY OF EASTON, MAYOR THOMAS GOLDSMITH, CITY COUNCIL PRESIDENT ROBERT WILLEVER, COUNCILMAN BURNS BAMFORD, COUNCILMAN ALFREDEAN JONES, COUNCILWOMAN BARBARA GRONER, EASTON FIRE CIVIL SERVICE COMMISSION MEMBERS, CRAIG SMITH, BETH MILIDES and RAYMOND IMLAY,

Petitioners

v.

JOSEPH A. CUVO, III, DAVID S. HARMAN, GEORGE W. LEIDY, TIMOTHY D. REILLY, and JEFFREY M. ZEMGULIS,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

RALPH J. BELLAFATTO
ATTORNEY ID # 43988
COUNSEL FOR INTERVENORS
2940 WILLIAM PENN HIGHWAY
EASTON, PA 18045

28 pp

I. QUESTION FOR REVIEW

1. IS THE ONE-YEAR PRE-EMPLOYMENT RESIDENCY REQUIREMENT IMPOSED BY 53 PA. C.S.A. §39864 UNENFORCEABLE AS VIOLATIVE OF THE PENNSYLVANIA AND FEDERAL CONSTITUTIONS, SPECIFICALLY, THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV, S2, AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

II. LIST OF ALL PARTIES

All parties' names appear in the caption of the case.

III. CITATIONS OF LOWER OPINIONS AND ORDERS

Decision of the Court of Common Pleas of Northampton County, Pennsylvania, September 12, 1995 (Moran, J.) - no official citation

_____ Pa. Commw. _____, 678 A.2d 424
_____ Pa. Sup., 867 A.2d 379

IV. JURISDICTION

Petitioners seek review of an Order of the Supreme Court of Pennsylvania, Middle District, entered January 9, 1997, denying a Petition for Allowance of Appeal. Petitioners rely upon: 28 U.S. C.S. §1257 as the statutory provision which confers jurisdiction on this Honorable Court, this being an appeal from the Decision of the Supreme Court of Pennsylvania, the Highest Court of that State. Petitioners have notified the Attorney General of Pennsylvania since this Petition draws into question the constitutionality of a statute of Pennsylvania.

V. CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The Constitution of the united States
Amendment XIV.

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VI. STATEMENT OF THE CASE

The Plaintiffs/Appellees in this action are all individuals who

have resided in the City of Easton for at least one year prior to applying for public employment with the City of Easton as a firefighter. This action was originally brought against the City of Easton seeking declaratory judgment and mandamus relief to prevent the City of Easton from considering applications from persons who have not resided within the City of Easton for at least one year prior to their application such as Intervenors/Appellants. The City of Easton has never taken any legislative steps to implement 53 P.S. §39864 either in the Rules and Regulations of the Fire Civil Service Board nor in the City's collective bargaining agreement with the International Association of Firefighters Local 713. For that matter, the City of Easton does not require residency after employment and has received and accepted applications for firefighter positions from applicants who have not resided within the city prior to applying.

Judge Moran's Decision of September 12, 1995 precludes the City or Easton from considering applications of nonresidents.

The record before the Court of Common Pleas was reached by stipulation between counsel for the City of Easton and Plaintiffs before Intervenors' involvement. That record is devoid of evidence of legislative purpose or intent of the pre-employment residency requirement, devoid of evidence substantiating the City of Easton's interest in employing the most qualified firefighters, and is devoid of any evidence establishing that the pre-employment residency requirement furthers a legitimate or compelling state interest.

Judge Moran's Decision was upheld by the Commonwealth Court. The Supreme Court of Pennsylvania declined to review the Commonwealth Court's Opinion and Order.

VII. ARGUMENT

By denying Intervenors' Petition for Allowance of Appeal, the Supreme Court of Pennsylvania has effectively ruled that 53 P.S. §39864 does not impose constitutionally impermissible burdens on the right to travel. 53 P.S. §39864 is a provision of the Third Class City Code which obligates cities of the Third Class to impose a one-year durational residency requirement upon applicants for the position of firefighter in those cities. In pertinent part, that provision provides:

> Each applicant shall have been a resident of the city in which he seeks employment for one year preced-

ing date of his application.

Although post-employment residency requirements have passed constitutional muster, pre-employment residency requirements similar to that found in Pennsylvania's Third Class City Code have repeatedly been invalidated as unconstitutional restrictions on the right to travel. Shapiro v. Thompson, 394 U.S. 618 (1969); Grace v. City of Detroit, 760 F. Supp. 646 (E.D. Mich. 1991); Perez v. Personnel Board of City of Chicago, 690 F. Supp. 670 (N.D. Ill. 1988); Nehring v. Ariyoshi, 443 F. Supp. 228 (D. Hawaii 1977).

Thus, the highest authority in the Supreme Court of Pennsylvania is at odds with the holdings of this court and various district courts throughout the country. Supreme Court review is necessary in order to establish uniformity of constitutional law.

The questions presented by this appeal are of substantial public importance. The final decisions of the judicial authorities in Pennsylvania will preclude the City of Easton from hiring the most qualified and best trained firefighters to protect the City of Easton residents and will effectively require the City of Easton to discriminate against other citizens of the Commonwealth of Pennsylvania and elsewhere, and will impede the right to free travel by limiting employment opportunities to nonresidents.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF COMMON PLEAS OF
NORTHAMPTON COUNTY, PENNSYLVANIA
CIVIL ACTION - EQUITY

JOSEPH A. CUVO, III; DAVID S. HARMAN; GEORGE W. LEIDY; TIMOTHY D. REILLY; and JEFFREY M. ZEMGULIS,	)	No. 1995-C-209 IN EQUITY
Plaintiffs	)	
v.	)	
CITY OF EASTON; MAYOR THOMAS GOLDSMITH; CITY COUNCIL PRESIDENT ROBERT WILLEVER; COUNCILMAN BURNS BAMFORD; COUNCILMAN ALFREDEAN JONES; COUNCILWOMAN BARBARA GRONER; EASTON FIRE CIVIL SERVICE COMMISSION MEMBERS, CRAIG SMITH, BETH MILIDES and RAYMOND IMLAY,	)	
Defendants	)	

OPINION OF THE COURT'

Background

Plaintiffs in this declaratory judgment action are applicants for the position of firefighter in defendant City of Easton ("city"). Prior to making their applications in December of 1993, each plaintiff had been a city resident for at least one year. Defendant city is a third class city under the Third Class City Code, 53 Pa.C.S.A. § 35101 et seq., and has adopted a home rule charter pursuant to the Optional Third Class City Charter Law, 53 Pa.C.S.A. 41101 set eq. ("Optional Charter Law"). It is plaintiffs' position that the Firemen's Civil Service Act, 53 Pa.C.S.A. § 39861 et seq., which includes a provision requiring that all applicants for the position of firefighter be city residents for a period of one year prior to applying

for the position, 53 Pa.C.S.A. § 39864, applies to the city of Easton. Defendants argue that the city's home rule charter powers enable it to set aside the one-year pre-employment residency requirement. Alternatively, defendants argue that such a residency requirement violates the constitutions of Pennsylvania and the United States.

Does the Third Class City Code Obligate the City to Impose the Pre-employment Residency Requirement?

The City of Easton has adopted a home rule charter under the Optional Charter Law. Third class cities under the Optional Charter Law are specifically precluded from exercising their powers in contravention of civil service laws adopted by the legislature:

> . . . Not withstanding the grant of powers contained in this act, no city hall exercise power contrary to or in limitation or enlargement of powers granted to the city by acts of the General Assembly which are:
>
> (1) Applicable to a class or classes of cities on the following subjects:
>
> * * * *
>
> (X) Relating to civil service.

53 Pa.C.S.A. § 41305 (1) (x) (emphasis added). The Optional Charter Law also incorporates the provisions of the Firemen's Civil Service Act as follows:

> (e) Subject to the provisions of Article XLIV of the Act of June 23, 1931 (P.L. 932), known as the "Third Class City Code" and the provisions of the act of May 31, 1933 (P.L. 1108), entitled "An act providing for the appointment, promotion, reduction, removal and reinstatement of paid officers, firemen and employees of fire departments and fire alarm operators and fire box inspectors in the bureaus of electricity in cities of the second and third class, defining the powers and duties of civil service commission for such purposes; and fixing penalties" [the Firemen's

> Civil Service Act], department heads shall appoint subordi nate officers and employees within their respective departments and may with approval of the mayor, remove such officers and employees.

53 Pa.C.S.A. § 41415(e) (emphasis added). The Firemen's Civil Service Act includes a provision requiring that each applicant for the position of firefighter "shall have been a resident of the city in which he seeks employment for one year next preceding date of his application. "53 Pa.C.S.A. § 39864.

The city argues that the Optional Charter Law grants it broad and general powers of self regulation such that it can ignore the provisions of the Firemen's Civil Service Act. A third class city under the Optional Charter Law does have full power to "[o]rganize and regulate its internal affairs, and to establish, alter, and abolish offices, positions and employments and to define the functions, powers and duties thereof and fix their term, tenure and compensation." 53 Pa.C.S.A. § 41303(1). Furthermore, the Optional Charter Law requires that interpretation of city powers be subject to liberal construction in the city's favor. 53 Pa.C.S.A. § 41304.

The city also points to Pennsylvania Supreme Court precedent which requires that any limitation on the power of third class cities under the Optional Charter Law relate only "to substantive matters of statewide concern. . .and not to matters affecting merely the personnel and administration of the [local] offices." Lennox v. Clark, 372 Pa. 355, 379, 93 A.2d 834 (1953); Greenberg v. Bradford City, 432 Pa. 611, 248 A.2d 51 (1968); Ebald v. Philadelphia, 387 Pa. 407,128 A.2d 352 (1957 (adopting per curiam the opinion at 7D. & C.2d 179 (C.P. Phila. 1956)).[1]

Greenberg held that the limitations on the home rule powers of third class cities under the Optional Charter Law did not prevent a city from enacting compensation schedules for police officers and firefighters that did not meet the state mandated standards. Ebald held that the City of Philadelphia, through its home rule charter, could adopt its own plan for heart and lung disability compensation,

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[1]That the holdings in Ebald and Lennox concern a first class city rather than a third class city is immaterial. The provisions of the Pennsylvania Constitution authorizing home rule do not distinguish among cities of different classes. See Greenberg, supra, 432 Pa. at 614-15 248 A.2d at __(applying Ebald and Lennox to a third class city with a home rule charter).

even though the state legislature had enacted a different plan. Finally, in Lennox, the Pennsylvania Supreme Court, construing § 18 of the First Class City Home Rule Act, 53 P.S. § 3421.18 (now 53 P.S. § 13133), which is substantially similar to 53 P.S. § 41305 governing home rule cities of the third class,[2] stated:

> [T]he limitations of power referred to. . . concern only laws in relation to substantive matters of State-wide concern, such as the health, safety security and general welfare of all the inhabitants of the State, and not to matters affecting merely the personnel and administration of the offices local to Philadelphia, which are of no concern to citizens else where.

372 Pa. at 379, 93 A.2d at ___ (emphasis deleted).

The city's argument, then, is that the one-year pre-employment residency requirement is not related to civil service and affects matters relating to merely personnel and administration which are not of statewide concern. We do not agree.

The cases cited by the city are distinguished from the case at hand in that these cases involve compensation or other benefit programs only. These cases do not involve the limited subject matter of civil service regulations relating to municipal employment. Thus, these cases do not represent an authorization for the municipality to alter the scheme developed by the legislature to regulate the municipal civil service.

Greenberg involved statutes which set statewide minimum pay scales for firemen and policemen employed by third class cities. Greenberg, supra, 432 Pa at 612, 248 A. 2d at ___ (applying 53 Pa.C.S.A. §§ 37001 & 37102). It is significant to note that these statutory provisions are not contained within the provision of the Third Class City Code governing civil service, but rather are contained in the provisions of the Third Class City Code establishing the internal organization of the Fire and Police Bureaus. See 53 P.S. §§ 37001 & 37102. It follows, by legislative definition, that compensation provisions are not part of the civil service statute.

Under the statutory scheme established by the legislature, the establishment and governance of the municipal civil service

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[2]A side-by-side comparison of § 13133 and § 41305 reveals virtually identical language.

system is separated from the regulation of compensation and benefit programs and from the internal organization structures of the fire and police departments. The focus of the civil service system is on rules governing application for employment, testing for employment, appointment to positions, promotions and removal from employment and the governance of the civil service system. Thus, we find that the reasoning used in Greenberg, Lennox, and Ebald does not apply to the present case.

While the Optional Charter Law allows for liberal construction in favor of a home rule city in general, 53 Pa.C.S.A. § 41304, it does not allow us to ignore a specific act of the legislature which clearly prohibits the exercise of home rule power in a given area, Exercise of home rule power relating to civil service is expressly prohibited by the Optional Charter Law. 53 Pa.C.S.A. § 41303(1)(x). By title, the Firemen's Civil Service Act relates to civil service. Furthermore, the Optional Charter Law specifically incorporates the Firemen's Civil Service Act. 53 Pa,C,S,A, § 41415(e). Thus, we find the provisions contained in the Firemen's Civil Service Act are included among the areas in which the legislature has specifically prohibited the exercise of home rule power. As such, we find that the city of Easton is subject to the one-year pre-employment residency requirement of Firemen's Civil Service Act.

Is the Pre-employment Residency Requirement Enforceable?

Having found the one-year pre-employment residency requirement cannot be altered through an exercise of home rule power, we next consider whether the requirement is valid and enforceable under the Federal Constitution. The city argues that a pre-employment residency requirement violates the equal protection clause of the Fourteenth Amendment by interfering with the constitutionally protected right to travel freely.

The right to travel freely has been guaranteed Constitutional protection by the Supreme Court of the United States. Shapiro v. Thompson, 394 U.S. 618 (1969). This right has been recognized by the Pennsylvania Supreme Court. Stottlemyer v. Stottlemyer, 458 Pa. 503, 329 A.2d 892 (1974). "[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, and regulations which unreasonably burden or restrict this movement." Stottlemyer, 458 Pa. at 508, 329 A.2d at ___, quoting Shapiro, 394 U.S. at 629.

The Supreme Court has stuck down many durational residency requirements used as prerequisites for government benefits as violating the equal protection clause of the Fourteenth Amendment by penalizing the right to travel. In Shapiro, supra, the court struck down a one-year residency requirement prior to the right to receive welfare benefits. In Dunn v. Blumstein, 405 U.S. 330 (1972), a one-year residency requirement in order to exercise the right to vote was struck down. Finally, in Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), the Court stuck down a one-year residency requirement for eligibility for non-emergency medical care.

In each of the above cases, the Court noted that any statutory classification that penalizes the right of interstate travel by depriving new residents of the right to vital government benefits and privileges must be supported by compelling state interest. Shapiro supra at 634; Dunn supra at 339; Memorial Hospital supra at 261. Under this 'strict scrutiny' standard, the government action "may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial government interest." Dunn 405 U.S. at 343. If the government pursues its compelling interest, its means must not unnecessarily burden the constitutionally protected activity, or, in other words, it must be the least drastic means possible. Id.

In other circumstances, however, the Supreme Court has affirmed durational residency requirement using only a 'rational relationship' test. in Marston v. Lewis, 410 U.S. 679 (1973), the Court found a fifty day pre-registration requirement for voting to be reasonable to allow the state to finalize its voter registration lists. In Starns v. Malkerson, 326 F.Supp. 234, D. Minn. (1970), affirmed, 401 U.S. 985 (1971) the Court upheld a one-year residency requirement as a condition for in-state tuition at a state university. Under the rational relationship test, the city need only show that its rule bears a rational relationship to a legitimate governmental interest. Schweiker v. Wilson, 450 U.S. 221 (1981).

The right of a city to require residency of those who actually do become city employees is undisputed. McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976). Furthermore, in McCarthy the Supreme Court stated "Neither in [Dunn, Shapiro or Memorial Hospital], Nor in any other [cases] have we questioned the validity or a condition placed upon municipal employment at the

time of his application." 424 U.S. at 646 (emphasis in original).

In Stottlemyer, supra, the Pennsylvania Supreme Court addressed the analysis required to test the validity of nay restriction on the right to travel. Relying on the decisions in Shapiro, Dunn, and Memorial Hospital, the Stottlemyer Court discussed the Supreme Court's "penalty analysis", noting that strict scrutiny should be applied only where the durational residency requirement under review imposes a penalty on interstate travel. 458 Pa. At 511, 329 A.2d at ___. While acknowledging that the parameters of the penalty concept were not clear, the Court concluded that "the extent to which a residency requirement can be said to impose a penalty upon interstate travel is a function of the extent to which the subject matter of the requirement is either a fundamental civil or political right or a matter essential to basic sustenance." 458 Pa. at 511-512, 329 A.2d at ___. Thus, if the subject matter of the requirement is a fundamental civil or political right or a matter essential to basic sustenance, strict scrutiny will be applied, otherwise the rational relationship test should be used. Applying this analysis, the Stottlemyer Court held that divorce was not a fundamental civil or political right or a matter pertaining to the basic sustenance of an individual and used the rational relationship standard to uphold a one-year pre-divorce residency requirement.

Applying the situation at hand to the analysis set out above, we do not find the right to compete for city employment to be a fundamental civil or political right or a matter essential to basic sustenance. It is not on the same level as the receipt of welfare benefits, eligibility for medical care, or the exercise of the voting privilege. It therefore follows that the one-year residency prerequisite to the exercise of the right to apply for city employment is not such a penalty upon interstate travel as to call for application of strict scrutiny. As such, it need only be reasonably related to a legitimate state interest.

The rational relationship inquiry "employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one, Perfection in making the necessary classifications is neither possible nor necessary." Schweiker, 450 U.S. at 234, quoting Massachusetts Bd. Of Retirement v. Murgia, 427 U.S. 307, 314 (1976). As long as the scheme chosen rationally advances a reasonable and identifiable governmental objects, we

must disregard the existence of other methods which we may find preferable. Schweiker, 450 U.S. at 235.

The Firemen's Civil Service Act's stated purpose is "to furnish a complete and exclusive system for the appointment, promotion, reduction, removal and reinstatement of all officers, firemen, or other employees of fire departments. . . in all cities of the . . . third class where such officers and employees are paid." 53 Pa.C.S.A. The commonwealth has a legitimate interest in equal treatment of its citizens throughout its many cities. The Firemen's Civil Service Act as a whole reasonably provides for such treatment by requiring all cities of the same class to follow the same civil service quidelines with respect to their firefighters. The one-year residency provision reasonably advances the commonwealth's objective by ensuring that local residents have access to local civil service jobs.

Plaintiffs suggest two alternative governmental interests promoted by the pre-employment residency requirement, that it ensures firefighters will be knowledgeable of their community and tnat it helps the local economy. It is not necessary for us to consider these interests because we find that the legislatures stated interest is legitimate.

The city urges us to follow Grace v. City of Detroit, 760 F.Supp. 646 (E.D.Mich. 1991), which also deals with pre-employment residency requirements for public employees. In Grace, the District court held a Detroit ordinance requiring one year pre-employment residency for public employment subject to strict scrutiny. Id. at 650. This analysis, however, was based on primarily upon Michigan caselaw which found that the right to compete for government employment is a "vital benefit and privilege" under the Michigan constitution. Id. At 650-51, citing Musto v. Redford Township, 357 N.W.2d 791 (Mich.App. 1984). A review of Pennsylvania caselaw, however, finds no similar precedent.

For the foregoing reasons, we find that the Firemen's Civil Service Act, as incorporated into the Home Rule Charter law, is valid and enforceable. The city of Easton shall not accept applications for employment as firefighters from applicants who do not meet the one-year residency requirement.

WHEREFORE, we enter the following:

IN THE COURT OF COMMON PLEAS OF
NORTHAMPTON COUNTY, PENNSYLVANIA
CIVIL ACTION - EQUITY

JOSEPH A. CUVO, III; DAVID S. HARMAN; GEORGE W. LEIDY; TIMOTHY D. REILLY; and JEFFREY M. ZEMGULIS,	)	No. 1995-C-209 IN EQUITY
Plaintiffs	)	
v.	)	
CITY OF EASTON; MAYOR THOMAS GOLDSMITH; CITY COUNCIL PRESIDENT ROBERT WILLEVER; COUNCILMAN BURNS BAMFORD; COUNCILMAN ALFREDEAN JONES; COUNCILWOMAN BARBARA GRONER; EASTON FIRE CIVIL SERVICE COMMISSION MEMBERS, CRAIG SMITH, BETH MILIDES and RAYMOND IMLAY,	)	
Defendants	)	

ORDER

AND NOW, this 12th day of September, 1995, this Court finds that the one-year pre-employment residency requirement for firefighters set forth in the Firemen's Civil Service Act as 53 Pa.C.S.A. § 39864 and incorporated into the Third Class City Code through 53 Pa.C.S.A. § 41305(1) (x) and §41415(e) is valid and enforceable. It is therefore ORDERED and DECREED that the City of Easton shall not accept applications for employment as firefighter from non-city residents as required by section 39864 of the Firemen's Civil Service Act.

BY THE COURT,
/S/ WILLIAM F. MORAN, J.

APPENDIX B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JOSEPH A. CUVO, III; DAVID S. HARMAN; GEORGE W. LEIDY; TIMOTHY D. REILLY; and JEFFREY M. ZEMGULIS,	:	
v.	:	NO. 2629 C.D. 1995
CITY OF EASTON; MAYOR THOMAS GOLDSMITH; CITY COUNCIL PRESIDENT ROBERT WILLEVER; COUNCILMAN BURNS BAMFORD; COUNCILMAN ALFREDEAN JONES; COUNCILWOMAN BARBARA GRONER; EASTON FIRE CIVIL SERVICE COMMISSION MEMBERS, CRAIG SMITH, BETH MILIDES and RAYMOND IMLAY, and JOHN F. GUIDO, BRAD HARRON, JOSEPH R. ADAMSKI, KENNETH W. HEISINGER, THOMAS C. LUCKEY, JEFFREY NICHOLLS, ERIC J. ORACH, and KEITH FRANKENFIELD, Appellants	:	Submitted: April 19, 1996

BEFORE: HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE JAMES R. KELLEY, Judge
HONORABLE GEORGE T. KELTON, Senior Judge

OPINION BY
SENIOR JUDGE KELTON **FILED:** June 24, 1996

John F. Guido, Brad Harron, Joseph R. Adamski, Kenneth W. Heisinger, Thomas C. Luckey, Jeffrey Nicholls, Eric J. Orach, and Keith Frankenfield (collectively Intervenors or "non-City resi-

dents") appeal from the September 12, 1995 order of the Court of Common Pleas of Northampton County which upheld as valid and enforceable the City of Easton's one-year pre-employment residency requirement for firefighters established in Section 4 of the Firemen's Civil Service Act (Civil Service Act), Act of May 31, 1933, P.L. 1108 as amended, 53 P.S. §39864

Issues

The issues presented on appeal are: 1) whether the Civil Service Act's pre-employment residency requirement limits the power granted to Easton under the Optional Third Class City Charter Law[1] to hire firefighters; or whether, to the contrary, such hiring is strictly a matter affecting the personnel and administration of Easton and is not a matter of statewide concern; and 2) whether the pre-employment residency requirement violates the right to interstate travel embodied in both the United States and Pennsylvania Constitutions.

We hold that the Civil Service Act's residency requirement is valid and affirm the Common Pleas order.

Background

On April 14, 1993, City Council adopted resolution No. 40-93, Rules and regulations of the Fire Civil Service Board. These regulations did not require a particular period of residency prior to applying for a firefighter position in the City of Easton. In December 1993, appellees Joseph A. Cuvo, III, David S. Harman, George W. Leidy, Timothy D. Reilly and Jeffrey M. Zemgulis (resident applicants), applied for the firefighter position after residing in Easton for a period of one-year and passed both the written and physical examinations. (Stipulation of Facts, R.R. 5a.) Thereafter, the resident applicants commenced an equity action against the City of Easton, its Mayor, the members of City Council and the members of the Fire Civil Service Commission, seeking to force the City's compliance with the Civil Service Act's pre-employment residency requirement and to prevent the city from considering applications from non-City residents. The City defendants filed an answer, new matter and counterclaim requesting a declaratory judgment that the pre-employment residency requirement was invalid and unenforceable.

The Honorable William T. Moran of the Court of Common

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[1]Act of July 15, 1957, P.L. 901, as amended, 53 P.S. §§41101 - 41625.

Pleas of Northampton County, in an opinion and order dated September 12, 1995, found that the one-year pre-employment residency requirement was valid and enforceable and ordered and decreed that the City could not accept firefighter applications from the non-City residents. Following the City's decision not to appeal this order, the above-named non-City residents petitioned the trial court for intervention, which was granted on October 11, 1995. This appeal followed.[2]

Discussion
Applicability of the Residency Requirement of Home Rule Charter Third Class Cities

The City of Easton is a third class city under The Third Class City Code, Act of June 3, 1931, P.L. 932, as amended, 53 P.S. §§35101-39701, which has adopted a home rule charter pursuant to the Optional Third Class City Charter Law. While the powers granted to Easton under the Optional Third Class City Charter Law are very broad and general, they are also limited in certain specific instances. Section 305 for example, provides:

> Notwithstanding the grant of powers contained in this act, not city shall exercise powers contrary to or in limitation or enlargement of powers granted to the city by acts of the General Assembly which are:
>
> (1) Applicable to a class or classes of cities on the following subjects:
>
> (x) relating to civil service.

53 P.S. §41305 (1) (x)

Section 4 of the Firemen's Civil Service Act provides, in pertinent part, that:

> Each applicant shall have been a resident of the city in

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[2]This Court's scope of review is limited and we will not disturb a decree which is in the nature of a final decree in equity unless it is not supported by the evidence or is demonstrably capricious. Tredyffrin-Easttown School District v. Valley Forge MusicFfair, Inc., 627 A.2d 814 n.4 (Pa. Cmwlth. 1993).

which he seeks employment for one year next preceding date of his application.

53 P.S. §39864.

Intervenors argue that the one-year pre-employment residency requirement is not related to civil service but affects matters relating merely to the personnel and administration of the City of Easton. Such matters, they argue, are exclusively within the City's province and are not a matter of statewide concern, citing Lennox v. Clark, 372 Pa. 355, 93 A.2d 834 (1953); Ebald v. City of Philadelphia,, 387 Pa. 407, 128 A.2d 352 (1957); and Greenberg v. City of Bradford, 432 Pa. 611, 248 A.2d 51 (1968). However, we believe that all three cases are distinguishable.

Ebald involved a suit by a Philadelphia Police Officer who sought to recover compensation for a disabling heart disease under the Heart and Lung Act.[3] The Supreme Court held that the Heart and Lung Act was superseded by Philadelphia Civil Service Regulation 32, which was promulgated in accordance with the Philadelphia Home Rule Charter. There, the Heart and Lung Act was found not to apply because it was not specifically incorporated into Philadelphia's Home Rule Charter; here, however, as noted below, the Civil Service Act is incorporated into the Optional third Class City Charter Law.

Greenberg is also distinguishable for similar reasons because it involved the issue of compensation for police and firefighters in the City of Bradford, although it too is a third class city operating under the Optional Third Class City Charter Law. Unlike civil service, the General Assembly did not provide for a specific enlargement or restriction of powers of such cities to regulate police compensation.

Finally, Intervenors cite the Lennox case, which involved an action brought following the passage of the First Class City Home Rule Act (Home Rule Act), Act of April 21, 1949, P.L. 665, as amended, 53 P.S. §3421.1 et seq., and adoption of the Philadelphia Home Rule Charter, thereby consolidating the city and county governments in the City of Philadelphia. Our Supreme Court determined that as of the effective date of the Home Rule Charter, "all city officers and employees became immediately subject to

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[3]Act of June 28, 1935, P.L. 477, as amended, 53 P.S. §§637-38.

these provisions of the Charter. . ." 372 Pa. 355, 368, 93 A.2d 834, 840 (1953) (emphasis added). We do not believe that Lennox allows this Court to ignore the specific provisions of Section 4 of the Civil Service Act which specifically requires one year's residency.

Moreover, the Legislature has specifically incorporated into the Optional Third Class Charter Law the provisions of the Civil Service Act, at Section 41415(e), to wit:

> (e) Subject to the provisions of Article XLIV of the act of June 23, 1931 (P.L. 932), known as the "Third Class City Code" and the provisions of the act of May 31, 1933 (P.L. 1108), entitled "An act providing for the appointment, promotion, reduction, removal and reinstatement of paid officers, firemen and employees of fire departments and of fire alarm operators and fire box inspectors in the bureaus of electricity in cities of the second and third class; defining the powers and duties of civil service commissions for such purposes; and fixing penalties," department heads shall appoint subordinate officers and employees within their respective departments and may, with approval of the mayor, remove such officers and employees.

53 P.S. §41415 (e) (emphasis added) (Footnotes omitted).

Therefore, it appears that in two specific instances, the General Assembly has clearly expressed its intent that third class cities operating under either the Optional Third Class City Charter Law or the Third Class City Code are subject to the local civil service laws, and in particular, the Civil Service Act. As correctly noted by the trail court, the "focus of the civil service system is on rules governing application for employment, testing for employment, appointments to positions, promotions and removal from employment and the governance of the civil service system." (Trial Court's Opinion, p.6.)

In this case, we conclude that the one-year residency requirement is not merely a matter of local concern; it ensures that all applicants state-wide for the position of firefighter in third class cities governed by the Optional Third Class City Charter Law are

treated equally. We conclude, therefore, that Home Rule Charter cities, such as Easton, which govern under the Optional Third Class City Charter Law, must observe the one-year residency requirement of Section 4 of the Civil Service Act, 53 P.S. §39864, as an act relating to civil service under the Optional Third Class City Charter Law, 53 P.S. §41305 (1) (x).

Constitutional Restrictions

Next, Intervenors argue that the one-year pre-employment residency requirement impairs their right to travel, as that right has been inferred from the privileges and immunities clause of section 2 of Article IV of the United States Constitution. Section 2 provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Intervenors also rely upon the equal protection clause of the Fourteenth Amendment. Intervenors assert that this right has long been a recognized right by the United States Supreme Court. See Shapiro v. Thompson, 394 U.S. 618, 630 (1969).

They argue that any restriction on travel, such as the one-year pre-employment residency requirement at issue in this case, must be supported by a compelling state interest. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972). Furthermore, Intervenors argue, if the "subject matter of the requirement is either a fundamental civil or political right or a matter essential to basic sustenance," then the courts will apply a strict scrutiny test to the restriction. Stottlemyer v. Stottlemyer, 458 Pa. 503, 511-12, 329 A. 2d 892, 896 (1974). Intervenors contend that the United States Supreme Court has repeatedly held that "pursuit of a 'common calling' is a fundamental right," citing United Building and Construction Trades Council v. Mayor of Camden, 465 U.S. 208 (1984); Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985); and Hicklin v. Orbeck, 437 U.S. 518 (1978). (Intervenors' brief, p. 14.)

Finally, Intervenors argue that, after analyzing the restrictions under the strict scrutiny test, three federal district courts have invalidated similar pre-employment residency requirements. See, Grace v. City of Detroit, 760 F. Supp. 646 (E.D. Mich. 1991) (the denial of an opportunity to compete for public employment until after a term of one-year residency is a substantial penalty and a very real hardship to persons who wish to relocate into a communi-

ty); Perex v. The Personnel Board of the City of Chicago, 690 Supp. 670 (N.D.Ill. 1988) (employment as a municipal police officer is sufficiently substantial that its denial to new residents for a period of over twenty months deters the individual form exercising his right to interstate travel and accordingly warrants strict scrutiny); and Nehring v. Ariyoshi, 443 F. Supp. 228 (D. Hawaii 1977) (the denial of the opportunity to apply for public employment does have a sufficient enough impact upon the right to travel to require that the statute be justified by a compelling state interest).

With respect to their state constitutional claims, Intervenors argue that the right to travel freely is also recognized by the Pennsylvania Supreme Court in Stottlemyer, 458 Pa. 503, 329 A.2d 892 (1974).[4] Specifically, they argue that the pre-employment residency requirement is unconstitutional under Section 26 of the Pennsylvania Constitution, which provides that:

> Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right. . .

Therefore, Intervenors contend, because the right to compete for public employment is a "civil right," it is entitled to Section 26 protection.

The appellee resident applicants argue that the strict scrutiny test is not applicable in this case because the right to compete for a job is neither a fundamental civil or political right nor is it a matter essential to basic sustenance, Appellees argue that following Shapiro, the United States Supreme Court seemed to limit the strict scrutiny test to those cases where a residency requirement impinges upon both the right to travel and some other fundamental right, such as voting, Dunn; or the receipt of non-emergency medical services, Memorial Hospital. However, the Supreme Court upheld a one-year residency requirement for establishment of jurisdiction in a divorce case because it did not interfere with the right to receive support or function as a citizen of the state, Sosna v. Iowa, 419 U.S. 393 (1975); and a one-year residency requirement for receiving lower college tuition in Starns v. Malkerson, 401 U.S.

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[4]However, in Stottlemyer, the Court held that Pennsylvania's requirement of a one year residence for divorce jurisdiction did not violate either equal protection or due process.

985 (1971), both times applying a reasonableness test.

More importantly, the resident applicants point out that the United States Supreme Court found that there is no constitutional right to employment as a police officer in Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976), and in dicta in another case stated that "[n]either in those cases, nor in any others, have we questioned the validity of a condition time of his application." McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 646 (1976) (footnote omitted). Appellees argue that under a reasonableness test, a one-year residency requirement should be upheld because it bears a rational relationship to a legitimate state end. We agree.

After a thorough review of th relevant United States Supreme Court cases, we conclude that the one-year pre-employment residency requirement at issue in this case must be analyzed under the rational relationship test. As the District Court noted in Perez v. The Personnel Board of The City of Chicago, 690 F. Supp. 670 (N.D. Ill. 1988):

> the Supreme Court has recognized that residence requirements by their very nature implicate the right to interstate travel. Thus, the government must justify any statute, regulation or policy that denies an individual a benefit or privilege on account of the individual's statue as either a non-resident or new resident. To aid in the analysis, the Supreme Court classifies residence requirements ad 'bona fide' or 'durational,' viewing the latter as potentially a greater burden on the right to travel and accordingly warranting closer scrutiny.

Id. at 673-674.

"Durational" residency requirements "penalize those persons who have traveled from one place to another to establish a new residence during the qualifying period." Dunn v. Blumstein, 405 U.S. 330, 334 (1972). The Perez court went on to state that:

> if the benefit or privilege denied to new residents is a fundamental constitutional right, the burden on interstate travel is sufficient to warrant strict scrutiny...

> If the benefit or privilege at issue is not fundamental, however, the effect that the temporary denial of the benefit or privilege to a new resident has on interstate travel is determined on a case-by-case basis.

Perez, 690 F. Supp. at 674 (citations omitted).

Although Intervenors assert that the right to compete for public employment is a fundamental civil right, we could uncover no United States or Pennsylvania Supreme Court cases that support this contention.[5] In fact, the united States Supreme Court has at least in dicta concluded that the opposite is true, in that:

> This Court's decisions give no support to the proposition that a right of governmental employment per se is fundamental. See San Antonio School District v. Rodriques, supra; Lindsey v. Normet, 405 U.S. 56, 73 (1972); Dandridge v. Williams, supra, at 485. Accordingly, we have expressly stated that a standard less than strict scrutiny 'has consistently been applied to state legislation restricting the availability of employment opportunities.' Ibid.

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313.

In this case, the pre-employment residency provision clearly meets the requirements of the equal protection clause,[6] because the

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[5]We disagree with Intervenors that either Commonwealth v. Moak, 452 Pa. 482, 307 A.2d 884 (1973), or Malmed v. Thornburgh, 621 F.2d 565 (3d Cir. 1980), cert. denied, 449 U.S. 955 (1980), stands for this proposition. Moak involved the question of whether assistant district attorneys in the City of Philadelphia were required to resign before becoming candidates for public office; and Malmed involved the issue of whether Pennsylvania's mandatory age of retirement for state judges was constitutional. Furthermore, the court in Malmed noted in fact that "[n]or is the interest of appellees in public employment a fundamental interest." 621 F.2d at 570.

[6]Despite Intervenors' assertion to the contrary, the United States Supreme Court has never specifically identified the constitutional source of the right to travel. Accordingly, although we analyse this cases are brought, we would find the statute constitutional under a privileges and immunities analysis as well. The privileges and immunities clause "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. . ." Toomer v. Witsell, 334 U.S. 385, 396 (1948). As we conclude herein, we believe that the Commonwealth has valid, independent reasons for the pre-employment residency requirement.

Commonwealth's classfication rationally furthers the purpose identified in the Civil Service Act of providing a uniform system "for the appointment, promotion, reduction, removal and reinstatement of all officers firemen, or other employees of fire departments," 53 P.S. §39864, by requiring all third class cities to follow the same civil service rules. In addition, the Commonwealth has a great interest in the safety of its residents and in having potential firefighter candidates who have familiarity with the community and knowledge of the local geography allowing for quicker response on the job.

Accordingly, for all of the reasons stated above, we affirm the order of the trial court.

/S/ GEORGE T. KELTON, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JOSEPH A. CUVO, III; DAVID S. HARMAN; GEORGE W. LEIDY; TIMOTHY D. REILLY; and JEFFREY M. ZEMGULIS,	:	
v.	:	NO. 2629 C.D. 1995
CITY OF EASTON; MAYOR THOMAS GOLDSMITH; CITY COUNCIL PRESIDENT ROBERT WILLEVER; COUNCILMAN BURNS BAMFORD; COUNCILMAN ALFREDEAN JONES; COUNCILWOMAN BARBARA GRONER; EASTON FIRE CIVIL SERVICE COMMISSION MEMBERS, CRAIG SMITH, BETH MILIDES and RAYMOND IMLAY, and JOHN F. GUIDO, BRAD HARRON, JOSEPH R. ADAMSKI, KENNETH W. HEISINGER, THOMAS C. LUCKEY, JEFFREY NICHOLLS, ERIC J. ORACH, and KEITH FRANKENFIELD, Appellants	:	

ORDER

AND NOW, this 24th day of June, 1996, the order of the Court of Common Pleas of Northampton County dated September 12, 1995, at Docket No. 1995-C-209 is hereby affirmed

/S/ GEORGE T. KELTON, Senior Judge
Certified From The Record and Order Exit June 24,1996
Deputy Prothonotary-Chief Clerk

APPENDIX C

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

JOSEPH A. CUVO, III; DAVID S. HARMAN; GEORGE W. LEIDY; TIMOTHY D. REILLY; and JEFFREY M. ZEMGULIS,	: No. 498 M.D. Allocatur : Docket, 1996. : : Petition for Allowance of : Appeal from the Common- wealth Court.
v.	:
CITY OF EASTON; MAYOR THOMAS GOLDSMITH; CITY COUNCIL PRESIDENT ROBERT WILLEVER; et al	: : :
PETITION OF: JOHN F. GUIDO, BRAD HARRON, JOSEPH R. ADAMSKI, KENNETH W. HEISINGER, THOMAS C. LUCKEY, JEFFREY NICHOLLS, ERIC J. ORACH, and KEITH FRANKENFIELD, Intervenors.	: : : : : : :

ORDER

PER CURIAM

AND NOW, this 7th day of January, 1997, the petition for allowance of appeal is denied.

ATTEST: Jan. 9, 1997

/S/ JOAN L. STEHULAK, Esquire
Deputy Prothonotary

January 9, 1997

TO: Ralph J. Bellafatto, Esquire

RE: JOSEPH A. CUVO, III, DAVID S. HARMAN, GEORGE W. LEIDY, TIMOTHY D. REILLY, and JEFFREY M. ZEMGULIS
V.
CITY OF EASTON, MAYOR THOMAS GOLDSMITH, CITY COUNCIL PRESIDENT ROBERT WILLEVER, at al*

PETITION OF: JOHN F. GUIDO, BRAD HARRON, JOSEPH R. ADAMSKI, KENNETH W. HEISINGER, THOMAS C. LUCKEY, JEFFREY NICHOLLS, ERIC J, ORACH, and KEITH FRANKENFIELD, Intervenors

NO. 0498 M.D. Allocatur Docket 1996

Dear Counsel:

This is to advise you that the attached order has been entered on the Petition for Allowance of Appeal filed in the above-captioned matter.

Very truly yours,
Office of the Prothonotary
Supreme Court of Pennsylvania

JLS/ma
c: COMMONWEALTH2629 C.D. 95
DOYLE, KELLEY, JJ., KELTON, S.J.
Northampton Civil
1995-C-209
Hon. William F. Moran, J.
Theresa Hogan, Esquire
Carol J. Weaver, Esquire